United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

74-1423

74-8053

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-8053

UNITED STATES OF AMERICA ex rel.
JOSEPH M. PAQUETTE,

Petitioner-Appellant,

against

J. E. LAVALLEE, superintendent
Clinton Correctional Facility,
Dannemora, New York,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX OF PETITIONER-APPELLANT

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Respondent-Appellee.	:	

BRIEF OF PETITIONER-APPELLANT

ISSUE PRESENTED FOR REVIEW

Was the retrial of petitioner, after an earlier trial on the same indictment at which a jury had been impaneled and then discharged, a violation of the double jeopardy clause of the Fifth Amendment of the Constitution of the United States, made applicable to the states through the Fourteenth Amendment?

STATEMENT OF THE CASE

Petitioner is presently serving a sentence of life imprisonment which was imposed on July 1, 1969 after

he was tried by a jury in the Suffolk County Court and convicted on the charge of first degree murder. This conviction was affirmed by the New York Supreme Court, Appellate Division, Second Department on November 28, 1971 (327 N.Y.S.2d 838) and by the New York Court of Appeals on December 28, 1972 (31 N.Y.2d 379).

On March 23, 1973, appellant's petition for a writ of habeas corpus was filed in the United States District Court for the Eastern District of New York. The petition asserts that appellant's custody is unlawful because his conviction was based upon proceedings which were in violation of the double jeopardy clause of the Fifth Amendment of the Constitution of the United States. This petition was dismissed, without a hearing, by Senior Judge Walter Bruchhausen on March 27, 1973. The dismissal was based on the sweeping statement that:

> "It is settled law that in a case where a mistrial is declared, after a jury is sworn but no evidence taken, a subsequent trial does not constitute double jeopardy."

On April 25, 1973, petitioner's notice of appeal to the United States Court of Appeals for the Second Circuit was filed. On December 4, 1973, petitioner sought a certificate of probable cause to appeal from the United States District Court for the Eastern District of New York.

By order dated December 10, 1973, this application was denied by Judge Bruchhausen. A notice of appeal from that order was filed on January 9, 1974.

On April 1, 1974, the United States Court of Appeals for the Second Circuit granted a certificate of probable cause and leave to proceed in forma pauperis. On April 2, 1974, the court appointed counsel for petitioner under the Criminal Justice Act, 18 U.S.C. § 3006A.

STATEMENT OF FACTS

Petitioner was indicted on March 17, 1967 on the charge of murder in the first degree. The selection of the jury for the first trial on this indictment took place on November 14, 15, 16, 21 and 22. Before the jury selection had been completed and before the jury was sworn, the assistant district attorney discovered that a witness, Walter Dennis Wickers, was unavailable. On November 20, 1967, the prosecution applied to the court to have that witness detained as a material witness. Thereafter, jury selection was completed and the jury was sworn.

On November 28, 1967, the case was called for trial and the assistant district attorney made the following statement:

"And although the People could probably make out a prima facie case without that witness Wickers, it would substantially reduce the likelihood of getting a conviction without his testimony, and therefore, the People feel they cannot proceed without him." (Transcript at 342)*.

The prosecutor stated that another witness named McManus had been unavailable since the case went on the ready trial calendar, but conceded that "we could proceed without him" (Id.).

The defense counsel objected:

"If it please the Court, the defendant cannot consent to this application, and opposes it. This case appeared on the ready trial calendar about three weeks prior to the time that we appeared in court on November 14th, at which time a hearing was held with reference to the suppression of evidence. Thereafter, and immediately following the hearing, selection of the jury was commenced on November 14th and continued on November 14th, 15th, 16th, 21st and 22nd. Upon the conclusion of the selection of the jury and two alternates, the jury was sworn.

At the present time there is nothing in the record which indicates at what particular point these witnesses were advised to be available for trial and what steps were taken to insure their presence for trial, other than the conclusory statements which Mr. Henry [the prosecutor] has set forth to the Court. Under the circumstances, the defendant respectfully opposes the application." (Transcript at 343-44).

The prosecutor then stated:

"Your Honor, it's appreciated that this witness was not in the category of a material

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* For the court's convenience, the transcript of the proceeding on November 28, 1967 has been annexed to this brief on appeal.

> witness and under some kind of bond and/or incarcerated, even though allegedly his life has been threatened if he were to testity, and we feel that the People did take what precautions we thought were necessary." (Transcript at 344-45).

The trial court then asked when the application was made to detain Wickers as a material witness and learned that it was on November 20, 1967--after three days of jury selection and before the jury was sworn. After the court granted the prosecution's motion to discharge the jury, defense counsel stated that he knew nothing about threats to witnesses and pointed out that the defendant had been incarcerated before the trial.

Almost two years later, on June 12, 1969, a second jury was selected for trial. Petitioner entered a plea of former jeopardy which was overruled. Only one of the two witnesses who had earlier been unavailable was produced to testify at the second trial. The jury returned a verdict of guilty of murder in the first degree on June 24, 1969.

ARGUMENT

I

PETITIONER WAS SUBJECTED TO JEOPARDY WHEN THE FIRST JURY WAS IMPANELED AND SWORN

In Benton v. Maryland, 395 U.S. 784 (1969), decided just one day before the jury returned the verdict

of guilty at the petitioner's trial,* the Supreme Court of the United States held that

> "[T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in out constitutional heritage, and that it should apply to the States through the Fourteenth Amendment. Insofar as it is inconsistent with this holding, Palko v. Connecticut [, 302 U.S. 319 (1937),] is overruled." (395 U.S. at 794)

The Court abandoned the notion that states could deny basic constitutional rights so long as the due process concept of "fundamental fairness" was not denied. The Court said that "the same constitutional standards apply against both the State and Federal Governments." 395 U.S. at 795. The standard to be applied by the states was required to be "this Court's interpretation of the Fifth Amendment double jeopardy provision." 395 U.S. at 796.

Whether the unavailability of witnesses is a sufficient ground for a mistrial without the consent of defendant is an issue which has been presented under the double jeopardy clause of the Fifth Amendment on many occasions. A leading case discussing this issue is Downum v. United States, 372 U.S. 734 (1963). In that action, the case was called for trial and both sides announced that they were ready. After the jury had been

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* Benton v. Maryland was cited to the court when Paquette appeared for sentencing on July 1, 1969 and was relied upon in the direct appeal in the state courts. The retroactive effect of Benton is recognized in Ashe v. Swenson, 397 U.S. 436, 437 n.1 (1970) referring to North Carolina v. Pearce, 395 U.S. 711 (1969), Waller v. Florida, 397 U.S. 387, 391 n.2 (1970) and Price v. Georgia, 398 U.S. 323, 330 n.9 (1970).

selected and sworn, the prosecution announced that its key witness on two of the counts in the indictment was unavailable. The defendant moved to dismiss these two counts and to continue the trial on the remainder of the counts. This motion was denied and the jury was discharged by the trial judge. Two days later, when the case was called again, a second jury was impaneled and petitioner was convicted after his plea of former jeopardy had been overruled. After the Court of Appeals for the Fifth Circuit affirmed the conviction, the Supreme Court granted certiorari because of conflict with Cornero v. United States, 48 F.2d 69 (9th Cir. 1931).

The Supreme Court held in Downum that the Cornero case stated the governing principle. 372 U.S. at 737. The defendant in Downum had been placed in jeopardy after the first jury was sworn and the factual circumstances did not justify the discharge of the first jury impaneled and the direction of a new trial. The Court quoted from Cornero as follows:

> "The fact is that, when the district attorney impaneled the jury without first ascertaining whether or not his witnesses were present, he took a chance. While their absence might have justified a continuance of the case in view of the fact that they were under bond to appear at that time and place, the question presented here is entirely different from that involved in the exercise of the sound discretion of the

> trial court in granting a continuance in furtherance of justice. The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy. There is no difference in principle between a discovery by the district attorney immediately after the jury was impaneled that his evidence was insufficient and a discovery after he had called some or all of his witnesses." 48 F.2d at 71.

In Bland v. Supreme Court, 20 N.Y.2d 552 (1967), the New York Court of Appeals was presented with a similar double jeopardy issue when a prosecutor sought a mistrial on the basis of the unavailability of his witnesses after a jury had been impaneled but before the first witness had been sworn. The New York Court, in a pre-Benton four to three decision, followed its traditional rule that a defendant was not placed in jeopardy until the jury had been examined and sworn and evidence given. The majority recognized that the precise point in a trial at which jeopardy attaches varied in the different states and federal courts. It referred to the Downum decision as an illustration of the federal rule and then stated:

> "We do not interpret that decision as requiring all of the State decisions to be uniform concerning the precise point in the trial when jeopardy attaches, or to impose a constitutional requirement that a defendant shall be deemed to have been placed in jeopardy at exactly the same stage in the trial that has been adopted in the Federal courts, e.g., when the jury has been sworn." (20 N.Y.2d at 555).

While calling the time when jeopardy attaches "merely technical," the majority stated that they endeavored "to conform our State procedures as nearly as may be to the Federal practice (People v. McQueen, 18 N.Y.2d 337, 344) . . ." (20 N.Y.2d at 555).

A strong dissent was filed in Bland, supra, by Judge Breitel and concurred in by Chief Judge Fuld and Judge Burke. The dissent pointed out that all other states which had considered the question had adopted the view that, in a jury-tried case, jeopardy attached after the jury was impaneled and sworn. 20 N.Y.2d at 556. It further pointed out that, although the rule requiring giving of some evidence had occasionally been applied in New York to cases other than nonjury cases, in other jurisdictions that rule was expressly limited to nonjury cases. 20 N.Y.2d at 557-58. The dissent concluded:

> "Adoption of the rule that jeopardy attaches when the jury is impaneled would conform New York law to that of other States and would avoid the possibility of conflict with Federal standards." (20 N.Y.2d at 559)

After the decision in Benton v. Maryland, supra, the suggestion of the dissent in Bland should be heeded and a uniform rule must be applied. The applicable rules on double jeopardy are those which the federal courts have established under the Fifth Amendment and which have been

made applicable under the Fourteenth Amendment by Benton v. Maryland, supra, to all of the states.*

When petitioner's conviction was appealed to the New York Court of Appeals, the court agreed that federal rules governing double jeopardy should apply to state prosecutions. 31 N.Y.2d at 380-81. Nevertheless, the court refused to follow the Downum decision of the Supreme Court. Instead, the court, without any factual basis for support, stated that the inability of the prosecution to produce witnesses could factually be attributed to defendant himself. 31 N.Y.2d at 380. (See Point III, infra, concerning the lack of factual support for this statement.)

II

THE FIRST TRIAL WAS IMPROPERLY DISCONTINUED IN ORDER TO GIVE THE STATE A MORE FAVORABLE OPPORTUNITY TO CONVICT PETITIONER

The constitutional policy underlying the Fifth Amendment provision that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb" is based upon both the governmental interest in enforcing the criminal law and an individual defendant's interest in finality and in the avoidance of harassment and unfair assistance to the prosecution. In

* See, e.g., the dissent in Gori v. United States, 367 U.S. 364, 371 (1961) (a 5-4 decision allowing reprosecution where the mistrial was granted in the "sole interest of the defendant") which states: "Once a jury has been impaneled and sworn, jeopardy attaches and a subsequent prosecution is barred, if mistrial is ordered--absent a showing of imperious necessity."

Green v. United States, 355 U.S. 184, 187-88 (1957), the Supreme Court stated:

> "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

The United States Supreme Court has been presented with numerous occasions requiring it to determine when a retrial is precluded by the policy of the double jeopardy clause of the Fifth Amendment after the first trial was aborted prior to verdict without the defendant's consent. The guiding principle was articulated by the Court as early as 1824, when it held in United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824), that a retrial was permissible when a jury had been unable to reach a verdict. Mr. Justice Story stated:

> "We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain

> and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of live, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office." (22 U.S. at 580)

This doctrine of "manifest necessity" has been applied in many decisions to judge the exercise of judicial discretion in declaring mistrials. The classical example of unforeseen circumstances which may arise during a trial and make its completion impossible is the failure of a jury to agree on a verdict. United States v. Perez, supra. Another example is Wade v. Hunter, 336 U.S. 684 (1949), where a court-martial was terminated and later recommenced because of the tactical situation of a military command. Reprosecution has also been permitted where possible bias of trial jurors was discovered during a trial. Simmons v. United States, 142 U.S. 148 (1891); Thompson v. United States, 155 U.S. 271 (1894). But the doctrine of manifest necessity and the discretion of the trial judge does not permit reprosecution in a case in which "the defendant would be harassed by successive, oppressive prosecutions, or in which a judge exercises his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to

convict the accused." Gori v. United States, 367 U.S. 364, 369 (1961), cited in Downum v. United States, 372 U.S. at 736.

In United States v. Jorn, 400 U.S. 470 (1971), the Court rejected the government's argument that Gori, supra, supported the view that "the unnecessarily inflicted second trial must . . . appear to be the result of a mistrial declaration which 'unfairly aids the prosecution or harrasses the defense.'" 400 U.S. at 483. The Court stated:

> "[I]t is also clear that recognition that the defendant can be reprosecuted for the same offense after successful appeal does not compel the conclusion that double jeopardy policies are confined to prevention of prosecutorial or judicial overreaching. For the crucial difference between reprosecution after appeal by the defendant and reprosecution after a sua sponte judicial mistrial declaration is that in the first situation the defendant has not been deprived of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal. On the other hand, where the judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of his 'valued right to have his trial completed by a particular tribunal.'" (400 U.S. at 484)

In Jorn, the Court also gave the following direction:

> "The trial judge must recognize that lack of preparedness by the Government to continue the trial directly implicates policies underpinning both the double jeopardy provision and the speedy trial guarantee. Cf. Downum v. United States, 372 U.S. 734 (1963)." (400 U.S. at 486)

During its last term, the Supreme Court again considered the policies underlying the double jeopardy clause of the Fifth Amendment in Illinois v. Somerville, 410 U.S. 458 (1973). The opinion of the Court, while finding that double jeopardy did not bar reprosecution where the trial judge granted a mistrial because the indictment was defective and could not be cured by waiver or amendment, carefully preserved one of the principles underlying the decision in Downum, supra. The Court said:

> "While the declaration of a mistrial on the basis of a rule or a defective procedure that would lend itself to prosecutorial manipulation would involve an entirely different question, cf. Downum v. United States, supra, such was not the situation in the above cases or in the instant case." (410 U.S. at 464).

Four Justices, in dissent in Illinois v. Somerville, agreed that the possibility of prosecutorial misconduct should bar a second trial after the jury is discharged and that the result in Downun was based on the additional principle that "no prosecutorial misconduct other than mere oversight and mistake" would also be sufficient to bar a second trial under the double jeopardy clause. 410 U.S. at 473 (White, J., with whom Douglas, J., and Brennan, J., join, dissenting); 410 U.S. at 483 (Marshall, J., dissenting).

The facts here plainly indicate that the prosecutor

was given an unfair opportunity to improve his case for the reprosecution of petitioner after petitioner was subjected to jeopardy in the first trial. The prosecutor did not apply to the court to obtain his material witness until after the case was called and jury selection had commenced. He permitted the jury to be sworn knowing that this witness was still unavailable. Moreover, the minutes of the application to discharge the jury indicate that on November 14 a hearing was held on a motion to supress evidence (transcript at 343). The issue on that hearing was the voluntariness of a confession to a police officer. The circumstances of this case reveal an opportunity to subject petitioner to the harrassment of facing a trial on the indictment while all the time preserving the prosecutor's option to proceed with his "prima facie case," (hoping that the missing witness would be found to substitute for or bolster the challenged confession) or to abort the trial.

The facts also indicate that the mistrial led to "continued and prolonged anxiety" of petitioner concerning the charge in the indictment. The first trial was ended on November 28, 1967 and petitioner was not retried until June of 1969--an interlude of almost two years.

In fact, petitioner was required to make a demand for a speedy trial pursuant to Section 669-a of the New York Code of Criminal Procedure, while serving a sentence under an unrelated robbery charge, before the indictment was brought to trial. See People ex rel. Paquette v. Cyrta, 25 N.Y.2d 749 (1969). A similar delay in Cornero v. United States, 48 F.2d 69 (9th Cir. 1931), led the dissent in Downum, supra, to conclude that the finding that the government proceeded to trial without its evidence in Cornero was "realistic" and that the retrial there was "harrassment." 372 U.S. at 739n.

III

THE DISTRICT COURT ERRED IN NOT AWARDING THE WRIT ON THE BASIS OF THE APPLICATION

Section 2243 of the Judicial Code provides, in pertinent part, as follows:

> "A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto." (28 U.S.C. § 2243)

The application filed in the District Court reveals no basis for denial of the writ. It refers to the statement by the New York Court of Appeals when it

affirmed appellant's conviction that "the prosecutor . . . told the court the missing witnesses had been threatened and attributed their disappearance to the defendant." 31 N.Y.2d at 380. The application continues:

> "The record does contain some testimony to the effect that threats had been made. None of these allegations were supported by proof, and there is nothing to indicate that the defendant had any knowledge of them even if they did occur. A reading of the record indicates that the allegation of threats was made no more than an unsubstantiated pretext to excuse witnesses for having absented themselves from the jurisdiction of the trial court." (Application at 5)

The minutes of petitioner's sentencing reveal that, on the motion to set aside the jury's verdict of conviction on the ground that appellant was placed in double jeopardy, the trial court held the mistrial was justified under the doctrine of manifest necessity by the absence of witnesses.* This conclusion of law does not support the statement by the New York Court of Appeals that the inability to produce witnesses "could be factually attributed to defendant himself." 31 N.Y.2d at 380. The application states that the record did not reveal that defendant, who has incarcerated, knew about such threats or was involved in them. The absence of such a factual finding reveals a

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* The transcript of petitioner's sentencing on July 1, 1969 has been annexed to this brief for the court's convenience.

lack of support for the statement made by the Court of Appeals. Accordingly, the district judge erred in failing to issue the writ or require a return on the application for the writ since it does not "appear from the application that the applicant or person detained is not entitled thereto." 28 U.S.C. § 2243.

Conclusion

For all of the foregoing reasons, the dismissal of appellant's petition must be reversed and the writ of habeas corpus issued.

Dated: New York, N.Y.
May 3, 1974

Respectfully submitted,

NORMAN R. NELSON, ESQ.
1 Chase Manhattan Plaza
New York, N.Y. 10005
Attorney for Petitioner-Appellant

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73C 394 B

JOSEPH M. PAQUETTE vs. J.E. LA VALLEE

DATE	PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS	
3/23/73	APPLICATION filed for a WRIT of HABEUS CORPUS. Copy of letter dtd. 3/23/73 re acknowledgement of papers	1/2	JS5
3-27-73	BY ERUCHHAUSEN, J. MEMORANDUM and ORDER filed. ORDERED that the petition be and the same is hereby DISMISSED. Copies were on this day mailed to petitioner, etc. (See Order)	3	
4-25-73	NOTICE OF APPEAL FILED. Letter of relator filed.	4 & 5	3/6
5-10-73	Copy of Notice of Appeal was on this day mailed to Clerk, U.S.C.A. Mlks		
5-10-73	All documents in this action were on this day transmitted to Clerk, U.S.C.A. Mlks		
5-14-73	Copy of Index filed with the U.S.C.A. acknowledgment of documents endorsed thereon, filed.	6	
8-6-73	Copy of letter of Clerk of Court filed dated 8-2-73 to relator re: case being before the Court of Appeals.	7	
12-7-73	Notice of motion filed for a Certificate of Probable Cause or, in the alternative, that a motion for re-argument be granted, etc. Affidavit of Service, etc. Letter of relator dated Dec. 3, 1973.	8 - 9-10	
12-10-73	BY ERUCHHAUSEN, J. MEMORANDUM and ORDER FILED. ORDERED that the motion for reargument is DENIED. A copy hereof has been forwarded by the secretary to ERUCHHAUSEN, J.	11	
1-9-74	NOTICE OF APPEAL FILED.	12	
2-6-74	Copy of Notice of Appeal was on this day mailed to Clerk, U.S.C.A. Mlks		

Date Feb 6, 19 74
LEWIS ORGEL
By Frank R. Burtis
Deputy

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
MAR 27 1973
TIME A.M.
P.M.

JOSEPH M. PAQUETTE,

Petitioner,

-against-

J. E. LA VALLEE, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY (Russell G. Oswald, Commissioner, Dept. of Correctional Services),

Respondent.

No. 73 C 394

March 27, 1973

M'FILMED

MEMORANDUM and ORDER

BRUCHHAUSEN, D. J.

The petitioner, now in State custody, by petition, sworn to March 20, 1973, applies for a writ of Habeas Corpus.

He alleges, viz:

1. On July 1, 1969, after trial before a jury in the Suffolk County Court and conviction of the crime of Murder, First Degree, he was sentenced to life imprisonment;

2. On November 28, 1971, the Appellate Division, Second Department, affirmed the judgment of conviction;

(3)

3. In January 1973, the Court of Appeals of this State also affirmed the said judgment.

He further alleges that the trial Judge committed error in ordering a mistrial and a new trial, thereby subjecting him to double jeopardy, in violation of his Constitutional rights.

In United States v. Gori, 282 F. 2d 43, Cir. 2, certiorari denied, 367 U.S. 364, it was held that a trial Judge has discretion to declare a mistrial and to require another panel to try a defendant and that such trial does not constitute double jeopardy.

It is settled law that in a case where a mistrial is declared, after a jury is sworn but no evidence taken, a subsequent trial does not constitute double jeopardy.

The Appellate Division, Second Department, affirmed the said judgment (37 App.Div. 2d 999) and stated:

> "In our opinion defendant was * not subjected to double jeopardy (Matter of Boland v. Supreme Court, County of New York, 20 N.Y. 2d 552.")

In Boland, supra, a mistrial was declared after the jury was sworn. The Court therein, stated:

> "** the time honored rule in New York State still obtains that an indicted defendant, who has pleaded not guilty, is not placed in jeopardy until the jury has been sworn, and evidence given." (citing cases).

Upon due deliberation, it is ordered that the petition be and the same is hereby dismissed.

Copies hereof have been forwarded to the petitioner and to the District Attorney of Suffolk County.

Walter Bruchhausen
Senior U. S. D. J.

MINUTES OF SENTENCE.

COUNTY COURT : SUFFOLK COUNTY

- -x

THE PEOPLE OF THE STATE OF NEW YORK :

- against - : Indictment No. 121-67

JOSEPH MICHAEL PAQUETTE, :

Defendant. :

- -x

Riverhead, New York
July 1, 1969

B e f o r e:

HON. PIERRE G. LUNDBERG, County Judge.

- - -

A p p e a r a n c e s:

HON. GEORGE J. ASPLAND, District Attorney for the County of Suffolk, by HENRY F. O'BRIEN, ESQ., Assistant District Attorney, of Counsel, for the People.

JAMES D. SAYER, ESQ., Public Defender, by EDWARD TIGHE, ESQ., of Counsel, for the Defendant.

JAMES M. RIBIN, C.S.R.
Official Stenographer

Minutes of Sentence

COURT CLERK: For sentence. People against Joseph Michael Paquette.

MR. TIGHE: For the defendant.

At this time, your Honor, I believe I reserved the motions?

THE COURT: Yes, sir.

MR. TIGHE: I now move to set the v... aside as contrary to the law against the w... of credible evidence and all provisions se... in the Code of Criminal Procedure.

I further move that the case be set ... on the ground that the defendant was place... double jeopardy, as I set forth in the op... of the proceedings before your Honor, as Y... Honor will recall, cited the United State... Supreme Court case, I believe it's in 395 ... 395 Federal Reporter, opinion by Mr. Jus... Douglas. I believe it was on all fours ... this case. Therefore, I ask that the v... be set aside and the indictment dismiss...

THE COURT: All right. Your mo... set aside under the Code is denied.

As to the motion on double jeop...

subsequent to that motion it was decided during the trial Benton against Maryland, number 201 in the October term 1968, which was decided on June 23, 1969, and I have read that case, and while it would appear that there is no question now that the double jeopardy provision of the Fifth Amendment is made applicable for it states through the Fourteenth Amendment in the same fashion that Mapp against Ohio applies and other cases that are set forth in that opinion, I would first adhere to my ruling which is based upon People against Bland, 20 New York 2nd, 556, that the law in the State of New York at the time of this trial was, if it still is not, that testimony had to be taken. That was the majority opinion, after the Downum case, which is 372 U.S. 735 which, I believe, is the case that you are citing on your motion.

MR. TIGHE: Yes, sir.

THE COURT: And I would like the record to show that I am familiar with what took place in 1967, I've had that part of the record read to me as to how the minutes came about.

Minutes of Sentence

And that in view of the testimony which was given in this case and all the facts that were elicited and what took place in 1967, I am now prepared to make a finding, the same as necessary under Judge Breitel's dissent in [illegible] against the Supreme Court, that there was a manifest necessity under the doctrine of Wade against Hunter, 336 US. 684, for this mistrial due to the absence of these witnesses who testified in this case that when they were subpoenaed they took off for Las Vegas. I think that in the interest of justice under the doctrine of this case it required a mistrial that was granted, and I make this finding solely if it is determined consistent with People against McQueen, which is 18 New York 2d 337, that the Denton decision somehow was retroactive in New York but if People against McQueen is followed it will not be retroactive in New York and so that it would have to be returned to this court for such a finding. I don't believe that such a finding has to be made because I believe the law, as applies to this case, that of People against

Minutes of Sentence

Plant. But for those reasons I would deny your motion.

MR. TIGHE: Your Honor, I respectfully except.

THE COURT: Yes.

MR. TIGHE: Note my exception.

THE COURT: Yes.

COURT CLERK: Joseph Michael Paquette, have you any legal cause to show why judgment should not now be pronounced against you?

THE DEFENDANT: No.

COURT CLERK: The answer is no, your Honor.

MR. TIGHE: At this time there is nothing counsel can say, that your Honor doesn't already know, about this case.

THE COURT: That's right. That's a mandatory sentence, I believe.

MR. TIGHE: Yes.

THE COURT: Is there anything you wish to say now?

THE DEFENDANT: There is nothing I want to say.

Minutes of Sentence

THE COURT: All right. Joseph Mich Piquette, you having been convicted by a ju... the crime of murder in the first degree cont... to Penal Law, Section 1044, subdivision 1, it is the judgment of this Court that you be imprisoned at hard labor in Sing Sing State Prison at Ossining, New York, for the term of your natural life which term shall be succes... to any other term you are now serving.

You are now remanded.

MR. TIGHE: He's handed me a note wit... his address to forward papers, your Honor.

THE COURT: Yes.

Mr. Tighe, get the defendant, please. I'm sorry. I forgot to mention in connecti... with your motion to double jeopardy that I h... also, in making that finding, taken into co... sideration the former plea that was entered ... this matter which was subsequently withdrawn which, to my mind, would eliminate any clai... by this defendant that he had been harassed by th: People in prosecuting him as they ha... And I would like the record to show that I ...

Certification

considered that also. I'm sorry that I didn't mention that earlier.

THE DEFENDANT: Are you speaking of the plea in January of 1988?

THE COURT: Yes, sir. The one which you subsequently withdrew.

THE DEFENDANT: Right.

- - -

I, James M. Ribes, Certified Shorthand Reporter, do hereby certify that I am an Official Court Reporter employed in the Suffolk County Court, State of New York, and that the foregoing sentence minutes in the matter of People vs. Joseph Michael Paquette are true and correct.

James M. Ribes

Colloquy

Riverhead, New York,

November 28, 1967.

(Appearances same as heretofore noted.)

THE CLERK: Criminal Ready Trial Calendar. On trial, People against Joseph Michael Paquette.

MR. HENRY: Your Honor, at this time the People would like to advise the Court that two witnesses who would play a material part in this trial are not available. One witness has recently evidently departed from his home without advising anyone as to where he was going, or his whereabouts.

THE COURT: When was he - who are you talking about?

MR. HENRY: His name is Wickers - Dennis. Walter Dennis Wickers.

THE COURT: When did he first become unavailable?

MR. HENRY: One moment. It was a day or two before Thanksgiving, Your Honor. The date escapes me.

Colloquy

THE COURT: All right, go ahead.

MR. HENRY: And although the People could probably make out a prima facie case without that witness Wickers, it would substantially reduce the likelihood of getting a conviction without his testimony, and therefore, the People feel they cannot proceed without him.

THE COURT: You mentioned two witnesses being unavailable.

MR. HENRY: The other witness is someone by the name of McManus, who was not available at the initial outset of this trial. He was not available when it went on the ready trial calendar. And although his presence and testimony would have been desirable, we could proceed without him. But now another witness is missing, why it makes the difference, we feel. Now, the police have made a very diligent search for both of these witnesses. To use the police jargon, they've staked out the home of Wickers since it was realized that he was missing, and they have an alarm out for him

but all without any success in finding him.

THE COURT: Mr. Lipkind?

MR. LIPKIND: What was the application?

MR. HENRY: I didn't make any formal application.

MR. LIPKIND: I don't know if there is anything I can comment upon.

THE COURT: Yes. Go ahead.

MR. HENRY: The People would request that this jury be discharged and the case marked off the calendar without prejudice to the People to allow us a substantial period of time to locate these witnesses.

THE COURT: Mr. Lipkind?

MR. LIPKIND: If it please the Court, the defendant cannot consent to this application, and opposes it. This case appeared on the ready trial calendar about three weeks prior to the time that we appeared in court on November 14th, at which time a hearing was held with reference to the suppression of evidence. Thereafter, and immediately following the hearing,

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selection of the jury was commenced on November 14th and continued on November 14th, 15th, 16th, 21st and 22nd. Upon the conclusion of the selection of the jury and two alternates, the jury was sworn.

At the present time there is nothing in the record which indicates at what particular point these witnesses were advised to be available for trial and what steps were taken to insure their presence for trial, other than the conclusory statements which Mr. Henry has set forth to the Court. Under the circumstances, the defendant respectfully opposes the application.

MR. HENRY: May I be heard?

THE COURT: Yes, sir.

MR. HENRY: Your Honor, it's appreciated that this witness was not in the category of a material witness and under some kind of bond and/or incarcerated, even though allegedly his life had been threatened if he were to testify, and we feel that the People did take what precautions we thought were

necessary.

The People answered ready on many occasions when this case appeared on the trial calendar, and adjournments were granted at the request of the defense, all of which period our witnesses were available. The People feel that - and incidentally, as soon as this witness' disappearance was brought to our attention, in turn we brought it to the attention not only of the Court but also of defense counsel.

THE COURT: Yes. When was the application made to detain him as a material witness?

MR. HENRY: As soon as we realized that -

THE COURT: What date was it, do you know?

MR. HENRY: I have it in my file, Your Honor, if you will bear with me.

THE COURT: Yes.

MR. HENRY: November 20, 1967.

THE COURT: That was a Monday.

MR. HENRY: Yes, sir, that was the

day.

THE COURT: That was the day you made application to the Court that he be detained as a material witness.

MR. HENRY: Yes, sir.

THE COURT: So it was on the - was it Monday that you first made application?

MR. HENRY: Yes, Your Honor.

THE COURT: That was three days after the trial started.

MR. HENRY: And prior to the swearing of the jury.

THE COURT: Well, this is a very unfortunate situation, but the Court is going to grant the application. You have your exception noted, Mr. Lipkind.

MR. LIPKIND: The only thing I want to say, Judge, this last statement about threatening of life of witnesses, I would like to say that I know nothing about this. It was never brought to my attention.

THE COURT: Of course.

MR. LIPKIND: My client has been

People's Application to Discharge Jury

incarcerated.

THE COURT: Several adjournments were sought on behalf of the defendant, but they were granted without opposition.

MR. LIPKIND: Yes.

THE COURT: In view of the fact that this witness is unavailable and you don't know where he is, I understand he has another indictment against him, does he?

MR. HENRY: Yes, Your Honor.

THE COURT: Then I want this processed as rapidly as possible rather than keep him in jail on a charge which you may never be able to bring to trial.

MR. HENRY: It's the People's intention to bring the other case against this defendant on the calendar as soon as there's a turnover of jurors.

THE COURT: Do you represent him on the robbery charge?

MR. LIPKIND: Yes, sir.

THE COURT: When will you be available for that?

MR. LIPKIND: I would appreciate it if the Court would extend me the courtesy until after the first of the year because I have quite a backlog of work in my office to take care of. We are now at the end of November, and December is a very short month.

MR. HENRY: For the record, Your Honor, I'd like to say that the People are ready to proceed at this time.

THE COURT: Well, for the record, I'd like to point out that this Court doesn't consider December a short month, unlike - I won't say that.

MR. LIPKIND: I don't know whether you sit during Christmas.

THE COURT: Yes - not Christmas Day. Other than that we're available if there's a trial going on. So it's really not a short month.

MR. LIPKIND: Well -

THE COURT: I mean if your consideration was that the Court would not be available during December.

MR. LIPKIND: It wasn't. But I think Your Honor can take judicial notice that we have run into the month of December, and there are many things that have to be done in an office that aren't of a legal nature. I'm a single practitioner - if Your Honor could extend me the extension until after the first of the year, if not at least until the third week of December.

THE COURT: The Court would be disposed to granting you as much time as you want, but I'm thinking of Mr. Paquette sitting in jail. However, you have been tied up here for this is the middle of the third week now, and I realize there are limitations on your time, too.

All right, we'll put this at the head of the calendar in January, the 2nd of January, the robbery indictment.

MR. LIPKIND: Thank you.

THE COURT: All right, bring in the jury.

THE CLERK: Bring the jury in,

please.

(Whereupon the jury was seated in the jury box at 9:43 A. M. and the following occurred.)

THE CLERK: People against Joseph Michael Paquette, cas on trial.

The jury will kindly answer the roll call.

(The Clerk of the Court called the roll and all the jurors were present and accounted for.)

THE CLERK: The jury is all present and accounted for, Your Honor.

THE COURT: Mr. Foreman and members of the jury: In what surely is one of the great anticlimaxes of your lives, I have to announce that the People are unable to go ahead with this trial because of the disappearance of one of their witnesses. On the 20th of November I signed an order directing one of the witnesses to be here and either be incarcerated in jail pending the trial or post adequate bond to

insure his appearance at the trial. He has disappeared and the police have made efforts to contact him either in Nevada or Florida, but they have been unable to pick him up at all. And in view of the length of time it's taken to select you, I cannot in good conscience ask you to be available and adjourn you until they pick up the witness.

So with great reluctance I am going to terminate the trial without prejudice to its being reinstituted as soon as the missing witness - in fact, there are two of them who are now missing - become available. It's an unfortunate thing that we've taken your time to no avail, and the time of the Court and all of the personnel here, and this is very unusual. As a matter of fact, it's the first time this has happened in my experience of five years. So I want to thank you on behalf of the public for giving of your time and attention for the perhaps boring two and a half weeks you spent here. Remember, as Milton says, "They also serve who only stand and wait." And we

cannot function here adequately as a Court without an adequate pool of jurors who are willing to give of their time and attention to these matters. Perhaps some of you, when you think of it later, will be relieved of the easing of your moral burden at not having to make decisions which now appear to you to be less than enjoyable perhaps when you think of the solemnity and responsibility of your being a juror in a case such as this.

Now, at this point I'm going to resort to a time-honored custom, and we'll have a mistrial in a moment. Juror No. 6, will you step down, please?

(Whereupon Juror No. 6 left the jury box.)

THE COURT: Now the Court observes that there are less than 12 jurors in the jury box, and therefore, we can't go ahead with less than a full jury, and consequently, the Court declares a mistrial.

Thank you again, gentlemen. And please report to the Central Jury Room.

THE CLERK: Retire the jury, please.

(Whereupon the remaining jurors retired at 9:46 A. M.)

THE COURT: Defendant remanded.

MR. LIPKIND: Your Honor, may I note my exception to the last granting of the motion for the mistrial?

THE COURT: Of course.

MR. LIPKIND: Thank you.

THE COURT: You gentlemen are excused.

Defendant remanded.

Court is recessed to Chambers awaiting assignment from Part 1.

THE CLERK: Court will take a short recess to Chambers at this time.

(Whereupon a recess was taken at 9:48 A. M.)

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DEPARTMENT OF

MAY 3 1974

NEW YORK CITY OFFICE

Louis J. Lefkowitz

RD ATTORNEY GENERAL